

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ANGELA R. LUGINBILL</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>RISK MANAGEMENT ALTERNATIVE</b>	)	
Respondent	)	Docket No. 1,011,148
	)	
AND	)	
	)	
<b>PENNSYLVANIA MFG. INSURANCE CO.</b>	)	
<b>KEMPER INSURANCE COMPANIES</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and both of its insurance carriers request review of the September 9, 2003 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

The Administrative Law Judge (ALJ) found the claimant was entitled to medical treatment and temporary total disability benefits at the stipulated rate of \$253.35 per week commencing June 6, 2003 and continuing until released to any substantial or gainful employment by Dr. Joel Lane, the physician who was also designated to serve as the authorized treating physician. The Order at issue does not reflect who is responsible to pay these benefits nor does it establish a date of accident. There is a stipulation that claimant filed her claim on June 19, 2003.

Respondent and each of its carriers argue that claimant has failed to establish necessary elements of her case. Specifically, that she has failed to establish an accidental injury arose out of and in the course of her employment with respondent. Additionally, they argue she failed to timely provide notice and written claim as required by the Kansas

Workers Compensation Act (Act).<sup>1</sup> Both carriers also contend that claimant's present claim for benefits is barred by virtue of the settlement entered into on March 10, 2003.

Claimant contends the ALJ's Order should be affirmed. She argues that the claim she settled stemmed from a wholly independent accident and related to injuries she sustained to her back and neck, not from the bilateral carpal tunnel condition that has now been diagnosed. As such, she maintains she did not settle anything other than her claim for a back injury. Moreover, her carpal tunnel complaints occurred over a period of time and culminated on her last date of work in December 2002. Under the principles set forth in *Berry v. Boeing Military Airplanes*,<sup>2</sup> claimant argues the last date worked is to be considered claimant's 'date of accident' for purposes of notice and timely written claim. Accordingly, claimant maintains she has met all the statutory requisites to establish her claim and that the court-ordered benefits are proper.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Board finds that this matter should be remanded to the ALJ for a finding as to the appropriate date of accident as well as the legal effect of the March 10, 2003 settlement.

Claimant began her employment with respondent in November of 2001. She was hired to work as a collector, making several hundred phone calls during an eight-hour shift constantly inputting information, as needed, into a computer. In July of 2002, she was riding in an elevator while at work for respondent when she fell. This was accepted as a compensable injury and treatment was provided. She also filed a workers compensation claim.<sup>3</sup> During treatment for what she alleged were low back and neck injuries, she voiced complaints about her left hand, specifically her left wrist and thumb. Claimant was initially treated at an occupational facility and eventually referred to Dr. Brad Storm for an evaluation.

Dr. Storm examined claimant and performed some diagnostic tests. On October 31, 2002, he concluded that she might have some nerve compression but that the tests were all essentially normal. He advised claimant that these were "functional symptoms without any basis in some sort of anatomic, work-related injury."<sup>4</sup> He recommended she stay on full work duty and offered her a splint, simply as a preventative measure.

Claimant continued working although she had non-medical, personal issues that required her to seek time off in November, 2002. Then, apparently in December, 2002 she also had an unrelated health issue that required her to be hospitalized for a period of days.

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<sup>1</sup> K.S.A. 44-501, et seq.

<sup>2</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

<sup>3</sup> Docket No. 1,005,512.

<sup>4</sup> P.H. Trans., Ex. 1.

Although claimant maintains she kept respondent fully informed about her situation, she was fired on December 6 or 10, 2002 for failing to show up at work. When asked, claimant's testimony is less than clear about when she last worked. At one point in the transcript she indicated that she didn't work at all in December and worked very little in November, due to a relative's illness. No work records were produced during the preliminary hearing that might shed light on this issue.

After leaving respondent's employ, claimant sought and obtained unemployment benefits. She also settled her earlier workers compensation claim on March 10, 2003. During the settlement hearing, at which she was represented, she was awarded \$3,000 on a full compromise of all issues. The Special ALJ specifically asked claimant if she was aware that the settlement was intended to legally conclude all claims for personal injury arising out of her employment with respondent. Claimant indicated that she understood this. She further acknowledged that she was electing to compromise her claim and settle it, "close[ing] it out completely." <sup>5</sup>

Thereafter, in May 2003, she sought treatment from Dr. Joel Lane, who diagnosed bilateral carpal tunnel complaints which, according to his notes, have been present for the past several years. He recommended surgery to both wrists and took her off work in May 2003. The first procedure was done on June 3, 2003 to her right hand. Her left hand was likewise done in August of 2003.

Claimant filed a written claim for workers compensation benefits against respondent on June 19, 2003. Because claimant alleges a series of repetitive injuries occurring between November 2, 2001 and ending on December 10, 2002, her alleged last date of employment with respondent, two carriers were implicated in the claim. During this period, respondent was insured first by Kemper Insurance for the period November 28, 2001 to December 4, 2002. The risk was then assumed by Pennsylvania Manufacturers Insurance Company and administered by Gallagher Bassett.

Following the preliminary hearing, an Order was entered, granting claimant's request for ongoing medical treatment and weekly benefits until she was released to any substantial gainful employment.

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits. <sup>6</sup> Alternatively, "[a] finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board." <sup>7</sup> These are the very issues framed by the parties. Accordingly, the Board

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<sup>5</sup> P.H. Trans., Ex. A.

<sup>6</sup> K.S.A. 44-551(b)(2)(A).

<sup>7</sup> K.S.A. 44-534a(a)(2).

finds that it has jurisdiction to decide this matter.

The Board arrives at this conclusion in spite of the fact that 'date of accident' is not normally considered jurisdictional. However, that rule applies to those claims where there is a dispute between carriers as to liability. In that instance, the Board has routinely declined to address those preliminary hearing disputes as they are not specifically listed as within the Board's statutory authority. In this case, the 'date of accident' is a necessary fact upon which notice, timely written claim and liability is predicated.<sup>8</sup> Without a determination of the correct 'date of accident', it is impossible for the Board to determine whether the ALJ's Order was proper under Kansas law. For this reason, remand is necessary.

Likewise, it is unclear whether the ALJ considered the legal effect of the March 10, 2003 settlement upon this claim. Whether this claim is barred by that settlement is, in the Board's view, among the "certain defenses" referenced in K.S.A. 44-534a. That phrase has been interpreted to mean "some defenses" and relates to issues that go to the compensability of a claim.<sup>9</sup> The Board finds that a settlement, entered into after leaving the respondent's employ could certainly be considered a bar to the claim asserted here. Accordingly, the Board has jurisdiction to review that issue. However, for whatever reason, the ALJ did not comment on that aspect of the evidence. The Board believes that remand is necessary in order to fully explore this issue and provide an explanation as to his reasons for his ruling.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated September 9, 2003 is hereby set aside and this matter is remanded for further proceedings consistent with the findings set forth herein.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2003.

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BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent and Kemper Ins. Co.  
Eric T. Lanham, Attorney for Respondent and Pennsylvania Manufacturers Ins.

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<sup>8</sup> *Goitia v. Southwest Development Services, Inc.*, Docket Nos. 233,983; 245,196, 2000 WL 137183 (Kan. WCAB Jan. 6, 2003).

<sup>9</sup> *Ivey v. Buckley Industries, Inc.*, Docket No. 217,041, 1997 WL 50133 (WCAB Jan. 27, 1997).

Steven J. Howard Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director